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No. 81-

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CALIFORNIA STATE BOARD
OF EQUALIZATION,

APPELLANT,

v.

WESTERN MARINA CORPORATION,
dba SHELTER ISLAND INN,

APPELLEE.

ON APPEAL FROM THE UNITED
STATES COURT OF APPEALS,
NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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Counsel for Appellant

QUESTIONS PRESENTED

I Are the Second and Fifth Circuits correct in In re Leavy (2d Cir.) (1936) 85 F.2d 25 and In re Hatfield Construction Company (5th Cir. 1974) 494 F.2d 1179, or is the contrary ruling of the Ninth Circuit in California State Board of Equalization v. Goggin (1957) 245 F.2d 44 (hereinafter sometimes "Goggin II"), that federal law precludes requiring a fiduciary to collect and pay a (sales or use) tax based on a liquidation sale under jurisdiction of the federal bankruptcy court, correct?

II Does federal law prohibit California from imposing its use tax (and the duty to collect it) with respect to sale by a corporation operating under Chapter XI of all its business assets as a going business.

* * * * *

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No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

CALIFORNIA STATE BOARD
OF EQUALIZATION,

Appellant

v.

WESTERN MARINA CORPORATION
dba, SHELTER ISLAND INN,

Appellee.

ON APPEAL FROM THE UNITED
STATES COURT OF APPEALS,
NINTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellant California State Board of Equalization (SBE) appeals from the judgment of the U.S. Court of Appeals for the Ninth Circuit which prevents California from collecting its sales or use tax with respect to transfer of

personal property as part of a sale of Appellee Western Marina's entire business as a going business while under Chapter XI proceedings.

OPINIONS BELOW

None of the lower court opinions are published. The Court of Appeals' "Memorandum" filed January 15, 1982, appears in Appendix A at pages A-1 to A-7; its "Order" (amending Memorandum) filed January 21, 1982 appears at pages A-8; and its "Order" filed April 7, 1982 denying petition for rehearing and suggestion for rehearing en banc, appears in Appendix C at pages A-27 to A-28.

The District Court decision, entitled "Order Affirming Bankruptcy Court Order Disallowing Claim of California State Board of Equalization in its Entirety," filed September 18, 1982, appears in Appendix B, pages A-10 to A-13.

The Bankruptcy Court's decision entitled, "Findings of Fact and Conclusions of Law on Order Disallowing Claim No. 120" Filed by California State Board of Equalization," filed April 21, 1980, appears in Appendix B, pages A-14 to A-25.

JURISDICTION

The Court of Appeals for the Ninth Circuit filed its "Memorandum" judgment on January 15, 1982, and its "Order" (amending its judgment) January 21, 1982. Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc was filed February 1, 1982, and was denied by "Order," filed April 7, 1982. A Notice of Appeal was filed in the Court of Appeals on June 1, 1982. (Appen. D, pp. A-37-A-38.) The time within which to docket this appeal expires on July 6, 1982. Timely docketing has been made. Jurisdiction of the United States Supreme Court is

invoked under 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 United States Code section 960 provides:

> "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

California Revenue and Taxation Code, sections 6201, 6202, 6203 and 6204, which impose use tax and the duty to collect it here, are contained in the Appendix E, pages A-39 through A-45.

STATEMENT OF THE CASE

California imposes a use tax which is not significantly different in effect on the seller from the sales taxes which the 2d and 5th Circuits have held must be collected and paid over by

bankruptcy trustees. (See In re Hatfield Construction Co. (1974) 494 F.2d 1179; In re Leavy (1936) 85 F.2d 25.) However, the Ninth Circuit in 1957 (Calif. Board of Equalization v. Goggin 245 F.2d 44) (incorrectly interpreting a series of earlier California decisions[1/]), stated in an opinion containing very broad language that the California use tax was an illegal interference with the bankruptcy liquidating

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1. A case called "Goggin I," California Board of Equalization v. Goggin (CA9 1951) 191 F.2d 726, misinterpreted earlier cases and California sales tax law in construing California sales tax not to apply to sales by bankruptcy trustees in liquidating, i.e., putting an end to, a business. This Court is not asked to concern itself with the Goggin I question because under California law, a use tax is payable if a sales tax is not. (Cal. Rev. & Tax Code, § 6401.) Only one of these two taxes is payable in any event, and the 2d and 5th Circuit decisions appear to clearly permit taxes which are substantially equivalent (for our purposes) to the California use tax. The Goggin II use tax case is in clear conflict with other circuits, and its reversal (or distinction) will permit California and other 9th Circuit states to collect their use type taxes.

process and enjoined SBE from collecting it from bankruptcy trustees or purchaser.

The court below felt bound by the broad language of Goggin II stating,

> "While we deem ourselves bound by . . . Goggin II as stating the law of our circuit, we have serious reservations as to the soundness of those rulings and urge en banc review. Cf., In re Hatfield Construction Company, 494 F.2d 1179 (5th Cir. 1974); In re Leavy 85 F.2d 25)." (Memorandum, CA 9 Cir, filed Jan. 15, 1982, as amended by Order filed Jan. 21, 1982.)

Thus, the Ninth Circuit has recognized that its earlier Goggin decision prevents Ninth Circuit states from collecting taxes on transactions identical to those which all other states are free to tax. This is the type of situation in which action by the United States Supreme Court to provide uniformity is essential. The reasoning of the Ninth Circuit "Goggin"

rule does not withstand analysis and is inconsistent with its own and other circuit rulings which allow other taxes to "burden" the bankruptcy liquidation process.

The "Goggin" rule is stated by the court below to be that "where a trustee, pursuant to a liquidation order, sells property of the debtor estate, California may not collect its sales or use tax." (Appen. A-3 - A-4.) Even were such a rule proper, it should not be expanded to prevent collection of a use tax on sale of a continually operated business as a going business.

* * * * *

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I

THIS COURT SHOULD RESOLVE THE DIRECT CONFLICT BETWEEN CIRCUITS WHETHER A SALES/USE TAX ON THE PURCHASER MAY BE IMPOSED ON SALES BY LIQUIDATING BANKRUPTCY FIDUCIARIES

The lower court here felt bound by a 1957 Ninth Circuit decision ("Goggin II" 245 F.2d 44) which held no use tax was collectible on sales by a bankruptcy trustee made after the court had ordered cessation of business and liquidation of the assets. The Court of Appeals here held that Goggin II creates a broad rule of non-taxability whenever there is "liquidation." (Appen. pp. A-5 - A-6.) It recognized that this Ninth Circuit rule is directly contrary to the decisions in the 2d and 5th Circuits stating,

. . . . .

. . . . .

> "While we deem ourselves bound by Goggin I[2] and Goggin II as stating the law of our circuit, we have serious reservations as to the soundness of those rulings and urge en banc review. Cf., In re Hatfield Construction Company, 494 F.2d 1179 (5th Cir. 1974); In re Leavy, 85 F.2d 25 (2d Cir. 1936)." (Appen. A-6 to A-7.)

The 5th Circuit also recognized in its Hatfield 1974 case the direct conflict between Goggin II and the 2d Circuit's In re Leavy. That court rejected Goggin II, finding the "well reasoned opinion of the Court of Appeals for the Second Circuit" the more persuasive. (See In re Hatfield, supra, at p. 1180.)

The analysis contained in Goggin II is faulty. It states that any act which burdens the liquidation process in invalid (Hatfield, supra, at pp.11180-1181.) and construes 28 United States Code, § 960

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2. See Footnote 1.

as a Congressional limitation on the power to to tax. (Id., at p. 1181.) Such statements conflict with a number of additional circuit court rulings and authorities recognizing that various taxes are proper, even though they burden the liquidation process. (See the Ninth Circuit's own United States v. Sampsell (1959) 266 F.2d 631, 635, and cases and authorities cited in In re Hatfield, supra, 494 F.2d 1179, 1181.)

Probable jurisdiction should be noted so this Court can (1) resolve the direct conflict between this case and the 2d and 5th Circuits, (2) clarify or disapprove the statements in Goggin II which seem to invalidate any burden on bankruptcy proceedings, and construe 28 U.S.C., § 960 as a limitation on the taxing power (contrary to holdings in a number of cases), and (3) equalize the scope of taxation involving bankruptcy of

of those states within the Ninth Circuit with that of states in other circuits.

* * * * *

II

ANY RESTRICTION ON TAXATION OF "LIQUIDATION" SALES SHOULD NOT PRECLUDE A STATE FROM TAXING THE SALE AS A GOING BUSINESS WHICH IS OPERATING UNDER BANKRUPTCY LAW, THE SAME AS IT TAXES ALL OTHER SALES OF OPERATING BUSINESSES

Goggin II involved sales by a bankruptcy trustee of individual items belonging to a business which earlier had closed under a specific court order to stop all operations and liquidate the assets. The broad language in that case was felt by the court here to establish a broad rule under which the operating debtor in possession in a Chapter XI proceeding here who sold his business as a going business is excused under Goggin II from collecting and paying (use) tax otherwise due.

SBE believes that extension of the Goggin II holding to this situation conflicts directly with 28 U.S.C., § 960. It creates a loophole under which any

retailer[3] may avoid tax simply by filing a reorganization petition and asking the court to approve the sale of the going business. 28 U.S.C., § 960 should be construed to apply to the sale of a business as a going business, i.e., the final business act, as well as all other business activities. The business operated and sold under bankruptcy court supervision receives the continuous benefits of state and local government which increase its financial gain when permitted to continue business operations and sell as a going business. It should pay its share of the taxes to state and local government just like any other seller of a going business.

* * * * *

---

3. Appellee was threatened with foreclosure. However, any business wanting to sell out can undoubtedly (in today's economy) arrange its financial affairs so that it is short of cash to pay current bills to justify filing a petition in the bankruptcy court and then sell the business with bankruptcy court approval.

CONCLUSION

The court should note probable jurisdiction:

(1) to resolve (by disapproving Goggin II) the direct conflict between this Ninth Circuit's Goggin II and the contrary decisions of the 2d and 5th circuits;

(2) to clarify (by disapproving) the broad language in Goggin II suggesting that any burden on the bankruptcy liquidating process is invalid; and

(3) clarify the meaning and effect of 28 U.S.C., § 960 (by construing it, not as a limit on the power to tax, but as an express [non-exclusive] requirement that Federal court fiduciaries pay state and local taxes the same as anyone else

. . . . .

with respect to operation of any business, including the disposition of a going business.)

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General

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Deputy Attorney General

Attorneys for Appellant,
California State Board of
Equalization

Appendix A

Opinion of Ninth Circuit in Final Judgment:

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 80-5737

CALIFORNIA STATE BOARD
OF EQUALIZATION,

Appellant,

v.

WESTERN MARINA CORPORATION,
dba SHELTER ISLAND INN,

Appellee.

MEMORANDUM

An Appeal from the United States District Court for the Southern District of California Hon. Milton L. Schwartz, Judge, Presiding
Argued and Submitted January 7, 1981

Before: PREGERSON and FERGUSON, Circuit Judges, and WEIGEL,* District Judge

[Filed Jan. 15, 1982]

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* The Honorable Stanley Weigel, United States District Judge for the Northern District of California, sitting by designation.

Appellant California State Board of Equalization (Board) seeks to impose a state use tax on the sale of appellee Western Marina Corporation's (Western) assets. The sale occurred after Western filed a voluntary petition under Chapter XI of the Bankruptcy Act. The bankruptcy court appointed a receiver who operated Western's assets which consisted of the Shelter Island Inn (Shelter). A secured creditor for Shelter stayed foreclosure proceedings to allow the receiver time to reorganize or sell the assets. These efforts were unsuccessful. The receiver believed the debtor had no possibility of reorganization. The secured creditor reinstituted the foreclosure proceedings, but just before foreclosure, Western received two offers to purchase Shelter. The bankruptcy court rejected the first as not sufficiently qualified but accepted

the second. The sale disposed of all Western's assets. Western remains in a Chapter XI proceedings, with no arrangement yet approved by the court.

The Board filed a claim of $5,911.90 for taxes due on the sale. Special tax counsel for the receiver objected. The bankruptcy court, relying exclusively on State Board of Equalization v. Goggin, 191 F.2d 726 (9th Cir. 1951) ("Goggin I"), and State Board of Equalization v. Goggin, 245 F.2d 44 (9th Cir. 1957) ("Goggin II") found that the sale of Western's assets was pursuant to a court order and therefore incurred no tax liability. The district court affirmed. The Board appeals.

Goggin I and Goggin II involved sales pursuant to liquidation orders in straight bankruptcy proceedings. Those cases lay down the law of this circuit that where a trustee, pursuant to a liquidation order,

sells property of the debtor estate, California may not collect its sales or use tax.

The rationale for the Goggin doctrine is twofold. First, California law does not apply a sales tax to such transactions. The California sales tax is an excise tax on the "privilege of conducting a retail business." Goggin I, supra, at 729. The court reasoned that once liquidation proceedings commence, sale of the debtor's assets does not constitute "conducting a retail business," but constitutes ending a business and this is not subject to the sales tax. Goggin, I, Id.

Second, the Supremacy Clause limits local tax burdens on federal officials. Based on this principle this court held that either a sales or a use tax "constitutes an unlawful interference with the process of the court of bankruptcy and is invalid." Goggin II, supra, at 46.

As the Board notes, federal law subjects all United States court officials who conduct business to "all Federal, State, and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation." 28 U.S.C. § 960. In Goggin II, this court held that § 960 "designated sales in the course of operation of a business as the sole area" where the state may impose a tax. (Emphasis added.) Goggin II, supra, at 46. The court then held that sales in liquidation pursuant to a court order are not sales in the course of the operation of a business and thus not subject to a local tax. Thus, § 960 does not provide the Board a basis on which to tax liquidation sales ordered by the bankruptcy court.

Goggin I and Goggin II are the controlling precedent in this circuit. Consistency requires us to apply the

doctrine to all liquidation sales conducted under the aegis of the bankruptcy court.[1] Such sales, like the sale of Shelter, are not conducted in the course of the operating a retail business. Like the sale in Goggin, the Shelter sale terminated the bankrupt's business. A tax on this sale would impose a burden on the liquidation process equal to a tax on a formal bankruptcy sale. Under Goggin, the state may not impose such a tax.

While we deem ourselves bound by Goggin I and Goggin II as stating the law of our circuit, we have serious reservations as to the soundness of those

---

1. This exemption from the sales and use tax does not apply to normal sales in the course of a receiver operated business, or to the sale of assets for the purpose of reorganization rather than liquidation. It only applies to situations, such as that here, that are functionally equivalent to a straight bankruptcy proceeding.

rulings and urge en banc review.

Cf., In re Hatfield Construction Company, 494 F.2d 1179 (5th Cir. 1974); In re Leavy, 135 F.2d 134 (8th Cir. 1943).

We AFFIRM.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-5737

O R D E R

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

v.

WESTERN MARINA CORPORATION, dba SHELTER ISLAND INN,

Appellee.

Before: PREGERSON and FERGUSON, Circuit Judges and WEIGEL, District Judge*

[Filed Jan 21 1982]

The citation of In re Leavy as it appears on page 3, lines 26-27, of the memorandum disposition filed January 15,

. . . .

. . . .

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*Honorable Stanley Weigel, United States District Judge for the Northern District of California, sitting by designation.

1982 is corrected to read In re Leavy, 85 F. 2d 25 (2nd Cir. 1936).

BY ORDER OF THE COURT:

/s/

Christopher W. Vasil
Acting Clerk of Court

Appendix B

Lower Court Findings and Opinions:

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Special Tax Counsel for Receiver

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:

WESTERN MARINA CORPORATION,
dba SHELTER ISLAND INN,

Debtor.

CV No. 80-0557-S

BKCY No. 77-000072-M

ORDER AFFIRMING BANKRUPTCY COURT ORDER DISALLOWING CLAIM OF CALIFORNIA STATE BOARD OF EQUALIZATION IN ITS ENTIRETY

[Lodged Sep 11 1980; Filed and Entered Sep 18 1980]

The Appeal by the California State Board of Equalization from the Bankruptcy Court Order Disallowing Claim of California

State Board of Equalization in its Entirety came on regularly to be heard before this Court on September 2, 1980, at 10:30 a.m., in Courtroom 1 of the United States District Court for the Southern District of California.

Present at that hearing were Neal J. Gobar, Esq., Deputy Attorney General, appearing for and on behalf of the appellant, California State Board of Equalization, and David R. Clark, Esq., appearing for and on behalf of the appellee, WESTERN MARINA CORPORATION, dba SHELTER ISLAND INN, Debtor, through its special tax counsel appointed by the Court for the Receiver.

The Court having read the pleading, having heard the argument of counsel, having considered all of the issues presented to it for consideration, and being fully advised,

HEREBY adopts by this reference the finding of fact and conclusions of law of the Bankruptcy Judge as this Court's Findings of Fact and Conclusions of Law, and further,

FINDS that the sale of Shelter Island Inn by the Receiver was made pursuant to an Order of the Bankruptcy Court for the purpose of liquidating the assets of the estate, that the sale pursuant to said Order liquidated the Debtor and terminated its business, and it is therefore,

ORDERED, ADJUDGED AND DECREED that when the Receiver sold Shelter Island Inn, the sale was made pursuant to an Order of the Bankruptcy Court for the purpose of liquidating the assets of the estate and was therefore not subject to either California sales or use tax liability, under the authority of California State Board of Equlaization [sic.] v. Goggin (9th Cir. 1951) 191 F.2d 726, and

California State Board of Equalization v. Goggin (9th Cir. 1957) 245 F. 2d 44, and it is further,

ORDERED, ADJUDGED AND DECREED that the Order Disallowing Claim of California State Board of Equalization in its Entirety be, and it is hereby, affirmed.

DATED: Sep 18 1980

/s/
HONORABLE EDWARD J. SCHWARTZ
UNITED STATES DISTRICT JUDGE

ORDER PREPARED BY:

/s/ Clark
WILLIAM P. SHANNAHAN
DAVID R. CLARK
Special Tax Counsel for Appellee

DISAPPROVED ONLY AS TO LINES 30-32 of Page 1:

/s/ Neal J. Gobar
GEORGE DEUKMEJIAN
Attorney General
NEIL J. GOBAR [sic.]
Deputy Attorney General

Attorneys for Appellant,
California State Board of Equalization

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

Bankruptcy No. 77-00072-M

CHAPTER XI

In re

WESTERN MARINA CORPORATION,
dba SHELTER ISLAND INN,

Debtor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ORDER DISALLOWING CLAIM NO. 120 FILED BY CALIFORNIA STATE BOARD OF EQUALIZATION

[Filed Apr 21 1980]

I

On March 7, 1979, the California State Board of Equalization filed claim number 120, which claims the amount of $5,911.90, plus interest and penalties, for sales and use taxes allegedly due from the Debtor on the sale of the

Shelter Island Inn to Frank R. Warren and Joanne C. Warren. The Receiver's objection to this claim came on for a hearing before this Court on March 27, 1980, at which this Court considered the stipulated statement of facts and heard the arguments of counsel.

II

Counsel for the Receiver and the claimant submitted a stipulation of facts filed on February 29, 1980, which states the facts of this dispute as follows:

"1. Since early 1976 debtor operated a hotel, restaurant and marina business. In late 1976 Debtor was in default to its principal secured lender, Central States Pension Fund, who initiated a foreclosure action by filinga notice of default on January 7, 1977.

"2. Debtor then filed a voluntary petition under Chapter XI of the

Bankruptcy Act on January 7, 1977, the primary purpose of which is to rehabilitate, reorganize and continue in existence and operation the debtor.

"3. By order of the Court dated January 10 and entered on January 14, 1977, 1977, debtor was authorized to operate its business and to remain in possession and to manage its assets as a Debtor in Possession.

"4. On May 5, 1977 at the urging of Central States Pension Fund, the court appointed James Bucher as Receiver for the debtor, at which time the Debtor in Possession was ordered to relinquish to the Receiver the operation and management of its assets and business, including operation of the hotel, restaurant and cocktail lounge.

"5. The debtor's hotel, restaurant and cocktail lounge business was after

January 10, 1977, operated under the authority of the court.

"6. Central States Pension Fund on February 17, 1977 filed an adversary proceeding to obtain the court's relief from the automatic stay of its foreclosure proceedings by virtue of the debtor's filing of the Chapter XI. On September 20, 1977, the court was advised of a potential sale negotiated by the debtor of its business. On November 11, 1977, the Court was advised that the potential buyer had withdrawn. On or about December 1, 1977, Central States Pension Fund and the debtor agreed that Central States would not further pursue its foreclosure proceedings for the next six months in order to permit the debtor to find a buyer to purchase its assets,

. . . .

. . . .

for the purpose of obtaining a greater sales price than would normally be expected from a foreclosure sale. The court approved the settlement between the parties and on December 20, 1977 ordered the automatic stay of foreclosure to terminate on June 1, 1978.

"7. Efforts by the debtor to obtain a buyer thereafter continued, including without limitation, contacting real estate brokers and placing newspaper advertisements.

"8. The debtor having failed to find a buyer, Central States Pension Fund on June 2, 1978 reinitiated foreclosure proceedings and, in the normal course, the foreclosure would have been completed in the latter part of September, 1978.

"9. The debtor then received and accepted an offer from a Los Angeles buyer and on August 21, 1978, filed a

document entitled 'Debtor's Application to Confirm Sale'. A true and correct copy of the Debtor's Application to Confirm Sale is attached hereto as Exhibit 'A', and by this reference is incorporated herein and made a part hereof as though fully set forth. [Copy of exhibit 'A' not included in these findings].

"10. The court set the matter for hearing on September 5, 1978, and notice thereof was given. Overbids were made and considered by the court. The highest overbid was made by Pacific Management Associates, Inc., but it was rejected by the court on the grounds that it was not sufficiently qualified. The second highest overbid was made by Frank R. Warren and Joanne C. Warren, and after the taking of evidence, the court found that the Warrens were sufficiently qualified.

"11. On September 25, 1978, the court filed a document entitled 'Order Confirming Sale'. A true and correct copy of the order is attached hereto as Exhibit 'B', and by this reference is incorporated herein and made a part hereof as though fully set forth. [Copy of exhibit 'B' not included with these findings].

"12. The principal terms of the sale to the Warrens, pursuant to the court order, were a purchase price of $3,200,000.00, payable all in cash through a 60-day escrow at the insistence of Central States Pension Fund, and in order to obtain the lessor's consent to the transfer of the lease to the Warrens and the State's consent to the transfer of the debtor's liquor license.

"13. The sale was consummated in accordance with the terms of the Escrow Instructions dated September 19, 1978 and the Agreement and Escrow Instructions

dated September 12, 1978. A true and correct copy of those documents is attached hereto as Exhibit 'C', and by reference is incorporated herein and made a part hereof as though fully set forth. [Copy of exhibit 'C' not included with these findings]. The Agreement and Escrow Instructions were attached as Exhibit 'A' to the court Order Confirming Sale. It is expressly agreed by and between the undersigned that the parties' characterization of this transaction in Paragraph 7 of the Agreement shall not be considered as evidence or a determination of the character of the transaction or whether it was taxable.

"14. The hotel, restaurant and marine business operation never ceased throughout the transfer.

"15. At the time of the aforementioned sale, in the opinion of the

Receiver the debtor had no possibility of a reorganization. If the sale had not been consummated, Central States Pension Fund intended to proceed with its foreclosure on the same assets. Foreclosure would probably have resulted in a substantially lower sales price. The debtor would have had substantially no assets remaining if Central States Pension Fund had consummated its foreclosure proceedings.

"16. At the time of the aforementioned sale of substantially all of the debtor's assets to the Warrens, the total amount of administrative expenses and claims filed against the debtor was substantially in excess of the value of all of its property.

"17. The aforementioned sale disposed of all of the debtor's assets. No other assets remained other than the cash received from the sale.

"18. From the proceeds of the aforementioned sale, the debtor paid off its remaining secured creditors. Approximately $500,000.00 remained, which was subject to approximately $900,000.00 in outstanding claims against the debtor. Whether the debtor is solvent or insolvent depends on the ultimate validity of those claims, some of which are subject to pending litigation.

"19. The debtor remains in Chapter XI. No plan of arrangement has been approved and confirmed in this Chapter XI proceeding.

"20. The California State Board of Equalization has filed a claim for alleged sales and use tax purportedly due in the amount of $5,911.90, plus interest and penalties. Special tax counsel appointed by the court for the Receiver does not object to the State's computation of the alleged basic amount, if any alleged sales and use tax was in fact due from

the aforementioned sale. However, objection is raised to the interest and penalties on the basis that the debtor is insolvent."

III

CONCLUSIONS OF LAW

1. Under the authority of California State Board of Equalization v. Goggin, 191 F. 2d 726 (9th Cir. 1951), and California State Board of Equalization v. Goggin 245 F. 2d 44 (9th Cir.1957), the California Sales and Use Tax Law does not apply to sales of assets by an estate under the jurisdiction of the Bankruptcy Court where such sale is pursuant to a Court order for the purpose of liquidation of the assets of the estate.

2. In this Chapter XI proceeding the Debtor had no possibility of reorganization as a going concern and was therefore a liquidation under the supervision of this Court.

3. When the Receiver sold the Shelter Island Inn, the sale was made pursuant to an order of this Court for the purpose of liquidating the assets of the estate, and was therefore not subject to either California Sales or Use Tax.

4. Claim 120 filed by the California State Board of Equalization for alleged Sales and Use Taxes of $5,911.90, plus interest and penalties, is disallowed in its entirety.

DATED: APR 21 1980

/s/

JAMES W. MEYERS, Judge
United States Bankruptcy Court

Appendix C

Judgment Appealed From

See Appendix A

A-1 - A-9

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 80-5737

DC No. 80-0557-S
BKCY. No. 77-0072-M

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

WESTERN MARINA CORPORATION, dba SHELTER ISLAND INN,

Appellee.

ORDER

Before: PREGERSON and FERGUSON, Circuit Judges, and WEIGEL,* District Judge

[Filed APR 7 1982]

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Pregerson and Ferguson

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*The Honorable Stanley Weigel, United States District Judge for the Northern District of California, sitting by designation.

voted to grant the suggestion for a rehearing en banc and Judge Weigel so recommended.

The full court has been advised of the suggestion for en banc rehearing and a judge in active service requested that a vote be taken on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

Upon the vote of the eligible judges in active service, a majority failed to vote for en banc rehearing.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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Attorneys for Appellant

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 80-5727

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

v.

WESTERN MARINA CORPORATION, dba SHELTER ISLAND INN,

Appellee.

PETITION FOR REHEARING (F.R.A.P. RULE 40) AND SUGGESTION FOR REHEARING EN BANC (F.R.A.P RULE 35)

[Filed FEB 1 1982]

. . . .

. . . .

INTRODUCTION

This Court's "Memorandum" filed January 15, 1982, as amended January 21, 1982, stated:

> "While we deem ourselves bound by Goggin I and Goggin II as stating the law of our circuit, we have serious reservations as to the soundness of those rulings and urge en banc review. Cf., In re Hatfield Construction Company, 494 F.2d 1179 (5th Cir. 1974); In re Leavy, 85 F. 2d 25 (2nd Cir. 1936.)"

The reasoning of Judge Fee in the Goggin cases, by which the court here felt bound, is indeed in conflict with the reasoning and decisions not only of the Second and Fifth Circuits, which uphold sales and use taxes on liquidative sales in bankruptcy, but also conflict with decision of this Court in United States v. Sampsell (1959) 266 F.2d 631, and the Eighth Circuit in State of Missouri v. Gleick (1943) 143 135 F.2d 134, and other cases requiring bankruptcy trustees to pay

various other taxes which burden the estates (see Appellant's Opening Brief pp. 33-34). Rehearing en banc should be granted to permit review of the Goggin "rule" in the light of these conflicting authorities.[1/]

In counsel's judgment, the panel's memorandum decision here failed to address the Sampsell case (whole reasoning and result conflicts with the application of the "Goggin rule") and overlooked material factual differences which remove the case from any controlling effect of the Goggin cases; and this case presents a situation proper for rehearing.

. . . .

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1. Goggin I (191 F.2d 726) misconstrued California law. A hearing en banc is apparently necessary to reverse this ruling and permit bankruptcy courts to follow California cases and statutes which clearly impose sales or use tax in situations here before this Court.

A. REHEARING EN BANC SHOULD BE GRANTED TO REVERSE THE GOGGIN CASES

At oral argument the panel advised that it could not reverse the earlier "Goggin" decisions. In its Memorandum the Court declined to limit the effect of the Goggin cases to the situation before the court there (where the court some time before the sales in issue had, in a straight bankruptcy, specifically ordered immediate termination of all business).

Apparently the panel agrees with the board that the reasoning in the Goggin cases conflicts with the reasoning and holdings of other circuits, and therefore, it is better to review en banc and reverse the Goggin cases entirely than to leave them with any effect by construing them narrowly. As is pointed out in the Board's briefs, the broad legal statements of Judge Fee (in Goggins) also conflict with

the reasoning and holding in State of Missouri v. Gleick, supra, 135 F.2d where a bankruptcy trustee who was merely liquidating was held not excused from unemployment taxes which burdened the liquidating process, and other cases requiring payment of other taxes. (See AOB 33-34.)

The "Goggin rule" is out of step with treatment of other taxes which "burden" the liquidating process and the holdings of other circuits. A rehearing en banc should be granted to reconsider the reasoning and reverse the Goggin cases.

B. ALTERNATIVELY, THE PANEL SHOULD REHEAR TO CONSIDER SIGNIFICANT FACTS AND CASES NOT DISCUSSED IN ITS MEMORANDUM

The January 15, 1982 Memorandum does not discuss significant facts which clearly distinguish the situation here from those in the Goggin cases. Apparently the panel prefers that the Goggin cases be reversed

entirely by an en banc consideration than to distinguish them and leave them with any future effect. Should rehearing en banc not be granted, the panel should grant rehearing to review the important differences present here which should preclude extension of the "Goggin rule" to this case.

In Goggin the court had earlier ordered termination of all business. All business had terminated well before the sales in issue. No business was going on when the sales there of individual assets (to separate purchasers?) were made simply to salvage some money from a dead business. Here the hotel restaurant business never stopped and the court never ordered any liquidation[2/]; the entire business was

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2. Here: By court orders requested by debtor and receiver they were authorized to continue operation of business and the sale in issue made by debtor was approved. No "liquidation"

sold as an operating business (while the state was furnishing services to the operating for which it should be entitled to recover taxes) with retail sales by debtor of inventory items continuing even after the 7:00 a.m. transfer time for most assets--while inventories were being taken. Section 960 of 28 U.S.C. was clearly applicable under the facts here a and other authorities which have rejected the narrow interpretation of section 960 by Judge Fee. (See AOB 33-34; Appellant's Reply Brief pp. 20-22.)

The Memorandum ignores the fact that "liquidation" is used apparently to mean

---

Fn. 2 cont'd:
was ever ordered by the court. No plan of arrangement was even presented or any other action taken which prevented a "reorganization." The entire proceeding was clearly undertaken to prevent a foreclosure which would have given rise to a sales and use tax on the sale of the very assets which this Court has held cannot be taxed.

different things at different times, and under Sampsell a sale under an order of liquidation is clearly not exempt by reason of the mere fact that it is a "liquidation" sale. Sampsell and Goggin are inconsistent in this respect in their reasoning. Sampsell and this case involve concurrent operation of business and liquidation; where in Goggin, there was no operation of business. "Consistency" does NOT require that the Goggin ruling be extended to apply to sales of going businesses. Sampsell and the many other cases cited in appellant's briefs require that Goggin be limited to its facts--not expanded. A rehearing should be granted for this purpose.

Respectfully submitted;

GEORGE DEUKMEJIAN, Attorney General

/s/

By: NEAL J. GOBAR
Deputy Attorney General

DATED: Jan 28, 1982

Appendix D

Notice of Appeal Filed

No. 80-5737

District Court No. 80-0557-5

Bankruptcy No. 77-0072-M

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

v.

WESTERN MARINA CORPORATION, dba SHELTER ISLAND INN,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES (Supreme Court Rule 10)

[Recd/Filed Clks. Office Winberry, Clerk U.S.C.A. 1982 JUN 1]

Notice is hereby given that the California State Board of Equalization,

the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment ("Memorandum") of the United States Court of Appeals, Ninth Circuit, entered in this action on January 15, 1982, amended by "Order" filed January 21, 1982, (Petition for Rehearing filed February 1, 1982, was denied by the Court of Appeals by "Order" filed April 7, 1982.)

This appeal is taken pursuant to 28 U.S.C. Section 1254(2).

DATED: May 28, 1982

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/s/

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Appendix E

CALIFORNIA REVENUE AND TAXATION CODE

§ 6201. Levy; rate

An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state at the rate of 3 percent of the sales price of the property, and at the rate of 2 1/2 percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate of 3 3/4 percent on and after July 1, 1972, and to and including June 30, 1973, and at the rate of 4 3/4 percent on and after July 1, 1973, and to

and including September 30, 1973, and at the rate of 3 3/4 percent on and after October 1, 1973, and to and including March 31, 1974, and at the rate of 4 3/4 percent thereafter.

CALIFORNIA REVENUE AND
TAXATION CODE

§ 6202. Liability for Tax; extinguishment

Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt from a retailer engaged in business in this State or from a retailer who is authorized by the Board, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer engaged in business in this State, given to the purchaser pursuant to Section 6203, is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

CALIFORNIA REVENUE AND
TAXATION CODE

§ 6203. Collection by retailer from purchaser; receipt

Except as provided by Sections 6292 and 6293 every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee

under the lease.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.

(b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

. . . .

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

CALIFORNIA REVENUE AND TAXATION CODE

§ 6204. Tax as retailers' debt to state

The tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from the customer under the representation by the retailer that it was tax constitutes debts owed by the retailer to this state.

No. 82-8

Office - Supreme Court, U.S.
FILED
AUG 4 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

CALIFORNIA STATE BOARD
OF EQUALIZATION

Appellant,

vs.

WESTERN MARINA CORPORATION,
dba SHELTER ISLAND INN,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT

MOTION BY APPELLEE TO DISMISS THE APPEAL, OR IN THE ALTERNATIVE, TO AFFIRM THE JUDGEMENT

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INTRODUCTION

The California State Board of Equalization (the "Board") seeks an appeal to this Court from a memorandum judgment of the Ninth Circuit Court of Appeals, which affirms two lower courts' holdings that a sale, such as the one which took place in this case, made pursuant to an order of the Bankruptcy Court for the purpose of liquidating the assets of the debtor estate is not subject to California sales or use tax liability.

In accordance with Rule 16 of the Rules of the Supreme Court of the United States, the appellee hereby moves to dismiss the Board's attempt to appeal on the ground that it is not within this Court's jurisdiction, and in the alternative, the appellee moves to affirm the judgment of the Ninth Circuit on the ground that there are no substantial federal questions requiring argument.

BECAUSE THE NINTH CIRCUIT DID NOT INVALIDATE CALIFORNIA'S SALES OR USE TAX STATUTORY SCHEME, THIS COURT MUST DECLINE THE BOARD'S INVITATION TO ACCEPT JURISDICTION OF THE APPEAL UNDER 28 U.S.C. SECTION 1254(2).

The Board has sought to invoke the jurisdiction of this Court on appeal under 28 U.S.C.§1254(2). *Appellant's Jurisdictional Statement, pages 3-4.* Section 1254(2) precludes review unless the aggrieved party is relying on a state statute held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States.

The Board does not fall within the scope of that rule. The three-page memorandum judgment of the Ninth Circuit in this case is attached here as Appendix A. The language of the opinion is self-evident. The decision did *not* invalidate any portion of California's statutory scheme regarding the imposition of sales or use tax liability. Accordingly, no appeal may be taken and the judgment should be affirmed.

The law, as enunciated by this Court, has consistently required that a

Court of Appeals must invalidate a state statute on federal grounds or an appeal will not lie under §1254(2). *Public Services Commission of Indiana vs. Batesville Telephone Co.* (1931) 284 U.S. 6, 52 S.Ct. 1, 76 L.Ed.135 [appeal dismissed because appellate court rested its decision on state law grounds]. In accord, *Baxter v. Continental Casualty Co.* (1931) 284 U.S.578, 52 S.Ct. 2, L.Ed. 502; *Bradford Electric Light Co. vs. Clapper* (1931) 284 U.S. 221, 52 S.Ct. 118, 76 L.Ed. 254 [no appeal proper where appellate court merely applied state law].

The memorandum judgment entered here was similarly based solely on the ground that a sale of assets of the debtor estate pursuant to a bankruptcy court liquidation order, was not subject to either sales or use tax liability under California law. That holding was based on two prior decisions of the Ninth Circuit Court of Appeals, *State Board of Equalization vs. Goggin,* 191 F.2d 726 (1951), *cert den.* 342 U.S. 909, and State Board of *Equalization vs. Goggin,* 245 F.2d 44 (1957), *cert. den.* 353 U.S. 961. As the Ninth Circuit noted here, the rationale for the *Goggin* doctrine is that California's sales/use tax is a state excise tax on the "privilege of conducting a retail business." Therefore, no taxable sale under California law occurs when property of the debtor estate is sold pursuant to a liquidation order, since that kind of sale is not made in the ordinary course of operating a retail business. *Goggin I, supra,* at 729-30; *Goggin II, supra,* at 46-7. Thus, because the judgment entered in this case simply applied long established Ninth Circuit precedent construing California law not to subject liquidation sales conducted under the aegis of the Bankruptcy Court to sales or use tax liability, it follows that no federal question is raised upon which to base the Board's attempted appeal, and it should therefore be dismissed.[1]

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[1] In Appellant's Jurisdictional Statement, the Board refers repeatedly to a purported holding by the Ninth Circuit that federal law "precludes" imposition of sales or use tax liability in this case. The record is clear and speaks for itself—there was no such holding. At most, the second *Goggin* opinion, which was relied upon to some extent here, included a discussion of the adverse effect which either a sales or use tax would have if imposed on a Bankruptcy Court-ordered liquidation sale. However, beyond no stretch of the imagination did

NEITHER IS THERE A CONFLICT AMONG CIRCUITS ON WHICH THE BOARD MAY BASE ITS APPEAL.

In Appellant's Jurisdictional Statement, the Board also contends that there is a conflict among circuits as to the imposition of sales or use tax liability on a debtor estate liquidating assets under order of court, and cites two cases alleged to support its assertion: *In Re Leavy* (2d Cir. 1936) 85 F.2d 25 and *In Re Hatfield Construction Co.* (5th Cir. 1974) 494 F.2d 1179. However, upon analysis, it is clear that those cases do not conflict with the applicable Ninth Circuit authority and, indeed, further illustrate the correct foundation underlying the *Goggin* doctrine.

As the Board conceded below, intrepretation of the California Sales and Use Tax Law is a question of state law binding on the federal courts. *Richfield Oil Corp. v. Board of Equalization* (1946) 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80. California law has uniformly held that the sales/use tax is a direct obligation of the retailer—an excise tax for the privilege of conducting a retail business—not a tax on the purchaser, on the sale or because of the sale.[2]

Contrary to California law that the legal incidence of the tax is on the seller, both the New York City sales tax involved in *Leavy* and the Georgia sales tax involved in *Hatfield* was imposed on the purchaser.

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that discussion give rise to an invalidation, on federal grounds, of California's statutory sales and use tax scheme. Even if it can be read so expansively as to constitute a ground for the Court's decision, the second *Goggin* opinion, as did the first, also rested on the independent ground that state law would not tax a sale not made in the ordinary course of conducting a retail business. Since this case similarly applied state law, there remains no federal grounds on which to appeal under §1254(2).

[2] See *Western Lithographic Co. v. State Board of Equalization* (1938) 11 Cal.2d 156, 78 P.2d 731; *National Ice and Cold Storage Co. v. Pacific Fruit Express Co.* (1938) 11 Cal. 2d 283, 79 P.2d 380; *City of Pomona v. Board of Equalization* (1959) 53 Cal.2d 305, 1 Cal.Rptr. 489, 347 P.2d 904; *People v. Herberts* (1935) 3 Cal.App.2d 482, 39 P.2d 829; *Graham Brothers Inc. v. L.A.* (1935) 6 Cal.App.2d 203, 44 P.2d 452; *Roth Drugs v. Johnson* (1936) 13 Cal.App.2d 720, 57 P.2d 1022; *Xerox Corp. v. Orange County* (1977) 66 Cal.App.3d 746, 136 Cal.Rptr.583.

Leavy, supra, at 27; *Hatfield, supra,* at 1180. Since the purchaser was liable for the tax, the Second and Fifth Circuits, respectively, were compelled to sustain the imposition of tax liability since they were not confronted by the question whether the debtor estate was "conducting a retail business" when making bankruptcy court-ordered liquidation sales. Based, as they are, on facts dissimilar to those involved in this case, *Leavy* and *Hatfield* are distinguishable and, moreover, not in conflict with the *Goggin* doctrine inasmuch as California requires a resolution of the issue whether Bankruptcy Court-ordered liquidation sales are made in the ordinary course of conducting a retail business. The Ninth Circuit, applying California law, has consistently held that they are not, and the *Goggin* doctrine does not therefore conflict with the Second and Fifth Circuit decisions, since the latter have not even had occasion to address the issue resolved by the *Goggin* doctrine.

THE FOREGOING REASONS REQUIRE THAT THE JUDGMENT BE AFFIRMED.

There are no substantive questions involved here requiring further argument. This Court should decline jurisdiction of the Board's appeal for the alternative reasons that there is no conflict among the circuits on the issue resolved in this case by the Ninth Circuit, nor is §1254(2) applicable.

The final plea made by the Board in Appellant's Jurisdictional Statement conjures up nothing more than a parade of horribles which do not, and cannot, materialize in this case. The *Goggin* doctrine specifically addressed, and resolved, the tax consequences of a bankruptcy court-ordered sale of assets for purposes of liquidating the debtor estate. Such sales were properly ruled free from tax liability because they are not made in the ordinary course of conducting a retail business, which is the sole privilege California chooses to tax.

Because this case involved such a sale, exempt from tax liability, it is respectfully submitted that either the appeal be dismissed and/or the Ninth Circuit's judgment be affirmed.

Respectfully submitted,

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---

*There are no parent, subsidiary or affiliate companies.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA STATE BOARD OF EQUALIZATION, Appellant, vs. WESTERN MARINA CORPORATION, dba SHELTER ISLAND INN, Appellee.	D.C. No. 80-0557-S BKCY. No. 77-0072-M No. 80-5737 **MEMORANDUM**

An Appeal from the United States District Court
for the Southern District of California
Hon. Milton L. Schwartz, Judge, Presiding
Argued and Submitted January 7, 1981

Before: PREGERSON and FERGUSON, Circuit Judges, and WEIGEL,* District Judge

Appellant California State Board of Equalization (Board) seeks to impose a state use tax on the sale of appellee Western Marina Corporations's (Western) assets. The sale occurred after Western filed a voluntary petition under Chapter XI of the Bankruptcy Act. The bankruptcy court appointed a receiver who operated Western's assets which consisted of the Shelter Island Inn (Shelter). A secured creditor for Shelter stayed foreclosure proceedings to allow the receiver time to reorganize or sell the assets. These efforts were unsuccessful. The receiver believed the debtor had no possibility of reorganization. The secured creditor

*The Honorable Stanley Weigel, United States District Judge for the Northern District of California, sitting by designation.

reinstituted the foreclosure proceedings, but just before foreclosure, Western received two offers to purchase Shelter. The bankruptcy court rejected the first as not sufficiently qualified but accepted the second. The sale disposed of all Western's assets. Western remains in a Chapter XI proceedings, with no arrangement yet approved by the court.

The Board filed a claim of $5,911.90 for taxes due on the sale. Special tax counsel for the receiver objected. The bankruptcy court, relying exclusively on *State Board of Equalization v. Goggin,* 191 F.2d 726 (9th Cir. 1951) ("Goggin I"), and *State Board of Equalization v. Goggin,* 245 F.2d 44 (9th Cir. 1957) ("Goggin II") found that the sale of Western's assets was pursuant to a court order and therefore incurred no tax liability. The district court affirmed. The Board appeals.

Goggin I and *Goggin II* involved sales pursuant to liquidation orders in straight bankruptcy proceedings. Those cases lay down the law of this circuit that where a trustee, pursuant to a liquidation order, sells property of the debtor estate, California may not collect its sales or use tax.

The rationale for the *Goggin* doctrine is twofold. First, California law does not apply a sales tax to such transactions. The California sales tax is an excise tax on the "privilege of conducting a retail business." *Goggin I, supra,* at 729. The court reasoned that once liquidation proceedings commence, sale of the debtor's assets does not constitute "conducting a retail business," but constitutes ending a business and thus is not subject to the sales tax. *Goggin, I, Id.*

Second, the Supremacy Clause limits local tax burdens on federal officials. Based on this principle this court held that either a sales or a use tax "constitutes an unlawful interference with the process of the court of bankruptcy and is invalid." *Goggin II, supra,* at 46.

As the Board notes, federal law subjects all United States court officials who conduct business to "all Federal, State, and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation." 28 U.S.C. § 960. In *Goggin II,* this court

held that §960 "designated sales in the *course of operation of a business* as the sole area" where the state may impose a tax. (Emphasis added.) *Goggin II, supra,* at 46. The court then held that sales in liquidation pursuant to a court order are not sales in the course of the operation of a business and thus not subject to a local tax. Thus, § 960 does not provide the Board a basis on which to tax liquidation sales ordered by the bankruptcy court.

Goggin I and *Goggin II* are the controlling precedent in this circuit. Consistency requires us to apply the doctrine to all liquidation sales conducted under the aegis of the bankruptcy court.[1] Such sales, like the sale of Shelter, are not conducted in the course of the operating a retail business. Like the sales in *Goggin,* the Shelter sale terminated the bankrupt's business. A tax on this sale would impose a burden on the liquidation process equal to a tax on a formal bankruptcy sale. Under *Goggin,* the state may not impose such a tax.

While we deem ourselves bound by *Goggin I* and *Goggin II* as stating the law of our circuit, we have serious reservations as to the soundness of those rulings and urge en banc review. *Cf., In re Hatfield Construction Company,* 494 F.2d 1179 (5th Cir. 1974); *In re Leavy,* 135 F.2d 134 (8th Cir. 1943).

We AFFIRM.

---

[1] This exemption from the sales and use tax does not apply to normal sales in the course of a receiver operated business, or to the sale of assets for the purpose of reorganization rather than liquidation. It only applies to situations, such as that here, that are functionally equivalent to a straight bankruptcy proceeding.

Office - Supreme Court, U.S.
FILED
AUG 30
ALEXANDER L. STEVAS
CLERK

No. 82-8

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CALIFORNIA STATE BOARD
OF EQUALIZATION,

Appellant,

v.

WESTERN MARINA CORPORATION,
dba SHELTER ISLAND INN,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT

RESPONSE TO MOTION TO DISMISS OR AFFIRM

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No. 82-8

IN THE SUFREME COURT OF THE UNITED STATES

October Term 1982

CALIFORNIA STATE BOARD
OF EQUALIZATION,

Appellant

v.

WESTERN MARINA CORPORATION
dba, SHELTER ISLAND INN,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, NINTH CIRCUIT

RESPONSE TO MOTION
TO DISMISS OR AFFIRM

Appellee misstates the decision appealed from and misinterprets the cases and statutes referred to in the Jurisdictional Statement. The decision appealed from and the "Goggin II" rule

by which the court felt itself bound, are specifically based upon federal limitations on the power of the state to tax. Further, the California use tax, like the taxes in issue in the Leavy and Hatfield cases is upon the purchaser. Therefore, this case directly conflicts with the second and fifth circuits.

I

COURT OF APPEALS DECISION APPEALED FROM HELD THE CALIFORNIA USE TAX INVALID UNDER FEDERAL LAW

This is clearly shown by the following statements contained in the Memorandum decision in the court below (Appen. A to Juris. Stmt.):

> ". . . [The Goggin] cases lay down the law of this circuit that where a trustee, pursuant to a liquidation order, sells property of the debtor estate, California may not collect its sales or use tax." (pp. A-3 - A-4.)

> ". . . [T]he Supremacy Clause limits local tax burdens on federal officials. Based on this principle this court held

that either a sales or a use tax 'constitutes an unlawful interference with the process of the court of bankruptcy and is invalid.' Goggin II, supra, at 46." (p. A-4.)

"In Goggin II, this court held that [28 U.S.C.] § 960 'designated sales in the course of operation of a business as the sole area' where the state may impose a tax." (p. A-5, emphasis added.)

"Goggin I and Goggin II are the controlling precedent in this circuit. . . . Under Goggin, the state may not impose [the tax here]." (pp. A-5 - A-6.)

"While we deem ourselves bound by Goggin I and Goggin II as stating the law of our circuit, we have serious reservations as to the soundness of those rulings [citing Hatfield and Leavy]." (pp. A-5 - A-7.)

The above quoted language in the lower court's decision here makes it clear that it was based upon a determination

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that federal law precluded[1/] California from imposing its sales or use tax.

The Goggin II decision upon which the decision below was based also clearly voided any California tax by reason

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1. To the extent that Goggin I may be construed as holding (in 1951) that California law did not tax a sale which puts an end to a retail business, this clearly does not represent California law today. Such sales are clearly taxable under the California Sales and Use Tax Law. (See U.S. Industries, Inc. v. State Board of Equalization (1962) 198 Cal.App.2d 775; Davis Wire Corp. v. State Bd. of Equalization (1976) 17 Cal.3d 761 (holding sales of entire businesses by retailers to be taxable); Calif. Rev. & Tax. Code, § 6019 (tax applies to receivers, trustees and other fiduciaries); 18 Cal. Admin. Code § 1595, par. (b)(1) "Tax applies to that portion of the gross receipts from the sale of a business that is attributable to the transfer of tangible personal property held or used in the course of activities requiring holding of a seller's permit . . . and acquired by the purchaser for use rather than resale.") There can be no serious contention that California law does not tax transfer of tangible personal property as here where it is transferred as a transfer of the entire business which terminates the business operation by the selling owner.

of federal bankruptcy law. That opinion stated,

> " . . . any impost upon the essential liquidation process of the bankruptcy court is void. . . . no burden could be placed on a liquidating sale in bankruptcy. (245 F.2d 44 at p. 45)
>
> [also]
>
> "Any act which hinders, delays or burdens the accomplishment of [liquidation] . . . constitutes an unlawful interference with the process of the court of bankruptcy and is invalid. . . . The tax in question was declared invalid because it burdened this essential process." (Ibid, at p. 46.)

There is no doubt that the lower court decision held a California use tax on the transaction in issue to be unlawful under federal law. Accordingly, SBE properly appealed under 28 U.S.C. section 1254 (2).[2/]

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2. If, for any reason, the court concludes that an appeal is not proper, the Jurisdictional Statement filed herein should be regarded and acted on as a Petition for Certiorari. (28 U.S.C., § 2103.)

II

THE CALIFORNIA USE TAX IN ISSUE HERE IS A TAX ON THE PURCHASER JUST AS THE TAXES IN ISSUE IN THE LEAVY AND HATFIELD CASES; THIS DECISION DIRECTLY CONFLICTS WITH THE SECOND AND FIFTH CIRCUITS

Appellee asserts that there is no conflict among circuits because (appellee claims) that the "legal incidence" of the taxes under consideration by the second and fifth circuits was on the purchaser, while the California "sales/use" tax is not a tax on the purchaser. (Motn to Dismiss or Affm, p. 3.) Appellee is simply wrong.

The California use tax is clearly imposed on the purchaser. (Calif. Rev. & Tax. Code, § 6201; Bank of America v. State Bd. of Equalization (1962) 209 Cal. App.2d 780,792.) Like the California use tax, the taxes in issue in Leavy and

Hatfield obligated the retailer to collect and remit them. (In re Hatfield Const. (1974) 494 F.2d 1179, 1180; In re Leavy (1936) 85 F.2d 25, 26.) All three sales were "liquidation" sales. It is respectfully submitted that this case is in direct conflict with the second and fifth circuits in all material respects. A ruling by this Court is necessary to restore uniformity among the states in the taxation of such sales.

CONCLUSION

Appellee's contentions on which it bases its Motion to Dismiss or Affirm are simply wrong. The court below did hold that under federal law, the imposition of the California use tax is invalid. The decision below is in direct conflict with the decisions of the second and fifth circuits. Such conflict can be resolved only by this Court. This Court should note

probable jurisdiction in this case in order to restore uniformity in application of federal law to the power of the states to tax in this field.

Respectfully submitted,

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